



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 312 OF 2023

Bhagwan s/o Vishwanath Waghmare
Age : 68 years, Occu: Labour,
R/o Dhakanwadi, Vadgaon Tq. Pathardi,
Dist. Ahmednagar.

... Appellant
[Orig. Accused]

Versus

1. State of Maharashtra
Through Police Inspector,
Pathardi Police Station,
Ahmednagar.

2. XYZ.

... Respondents

.....

Mr. Uttam L. Telgaonkar, Advocate for the Appellant.
Mr. D. R. Korade, APP for Respondent No.1-State.
Mr. B. N. Patil, Advocate for Respondent No.2 (appointed)

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 13.11.2024

Pronounced on : 21.11.2024

JUDGMENT :

1. In this appeal, exception is taken to the judgment and order dated 04.04.2019 passed by Judge, Special Court (POCSO Act), Ahmednagar in Special Case No. 171 of 2017, by which appellant is held guilty of offence punishable under Sections 452, 366-A, 376(2) (i), 376(2)(m), 506 of IPC and Section 3 punishable u/s 4 of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act].

FACTS IN BRIEF LEADING TO PROSECUTION

2. Appellant was chargesheeted by Pathardi Police Station on accusation that on 01.04.2017, accused entered into the house of informant with intention and preparation to cause hurt to victim, a five years old girl. He lifted the victim and brought her out with intention to have forceful sexual intercourse with her, and committed forceful rape and thereby committed offence punishable under Sections 452, 366-A, 376(2)(i)(m), 506 of IPC and Section 3 punishable under Section 4 of the POCSO Act.

3. On above premise, on refusal of charge, trial was conducted by Special Court wherein prosecution adduced evidence of as many as 9 witnesses and also relied on documentary evidence. By judgment and order dated 04.04.2019, learned trial Judge accepted the prosecution story for commission of offence under Sections 452, 366-A, 376(2)(i), 376(2)(m), 506 of IPC and Section 3 punishable under Section 4 of the POCSO Act. Such judgment is the subject matter of the instant appeal.

EVIDENCE BEFORE THE TRIAL COURT

4. Sum and substance of the prosecution evidence is as under:

PW1 Kanifnath, spot pancha, at Exhibit 16 deposed about spot panchanama being drawn in his presence which he identified to be at Exhibit 17. Spot was house of accused.

PW2 Mother of victim deposed and gave name of her daughter and gave her age to be 5 years. Regarding the occurrence, in para 2, she deposed as under:

“At the time of incident I had gone to Ajinath Bade for doing labour work. My work was over at about 05.00 p.m. My husband had come to me while I was working. He had come to take grass. He took the grass with him. We returned to home. xyz was crying at that time. At that time Shital Dhakne came. Shital told that xyz was crying as her father has gone so she took near her xyz and she gave water to xyz. Shital told that the accused left xyz at the door of our house and the accused ran away towards mountain. I took xyz near me. xyz has received injury on her private part. There was bleeding to her private part. There was bleeding on her clothes. She had wore frock and knicker. She told that Baba has taken her into his house and he pressed her and left her on the door. I had seen the injury on her private part and I was assured that accused committed rape on xyz. We myself, my husband, 2-4 persons took xyz by jeep to Pathardi at Rural Hospital. I again say that we went to police Chowki. I narrated the incident to

police. The police wrote the complaint. I put thumb mark on it. The contents therein are correct. It bears Exh.19.”

PW3 Bhanudas is pancha to seizure of clothes of victim vide panchanama Exhibit 24. He deposed that on 02.04.2017, in his presence, mother of victim, who had come to the police station, handed over clothes articles 1 and 2, which he identified along with panchanama Exhibit 24, bearing his signature.

PW4 Neighbour of informant and accused. She stated that she resided at Dhakanwadi. Accused resided in the adjacent house. According to her, on 01.04.2017 around 5.00 p.m. while she was returning after answering call of nature, she saw accused carrying victim and dropping her near her house. According to her, at that time, victim was crying and then she further saw accused running towards hill. She noticed blood on the person of victim and she inquired victim about her father and she told while crying that he had been to the field. So this witness gave message to her father and he came and took victim for medical treatment. She claims that when she inquired with victim as to what happened, victim told her that accused slept over her.

PW5 Dr. Bangar, medical expert, who examined victim and issued medical papers Exhibit 28 and referred victim for treatment. According to him, the injury on the person of victim is possible due to forceful rape.

PW6 Vitthal acted as pancha to seizure of cloths of accused vide panchanama Exhibit 30.

PW7 is the victim who is examined in question-answer form.

PW8 API Pardeshi is the Investigating Officer.

PW9 Dr. Manisha Hange is the medical practitioner, who examined accused and issued certificate Exhibits 45 and 46.

SUBMISSIONS

On behalf of the appellant :

5. At the outset, learned counsel for the appellant submits that the alleged occurrence is of 1st April and statement of victim is recorded after four days and even statements of witnesses are recorded after 3 days and the delay is not properly explained and hence, according to him, there is possibility of concocted version being reported. Pointing to the above evidence, learned counsel would submit that there is false implication and moreover, guilt is recorded on weak and hearsay evidence.

6. Emphasizing and elaborating his arguments, learned counsel took this court through the evidence of informant and would submit that informant mother was not at home. She was out of the house. She had been informed by neighbour who has merely claimed to have

seen accused carrying victim and dropping her at her house. That, evidence of informant and neighbour is heavily relied by learned trial court by ignoring the answers by these witnesses in cross. He submitted that victim was said to be playing with her friends, but none of her friends are examined. That, there is no evidence of victim being carried anywhere. He submitted that even answers given by witness to the prosecution questions does not categorically establish offence of forceful sexual assault as is alleged to have been committed.

7. Learned counsel pointed out that, here, medical evidence is not concrete and sure about commission of rape. Scientific evidence also does not cogently establishes involvement of appellant. He submits that, from the medical evidence, it is clearly emerging that, here, there was no penetration at all, which is *sine qua non* for establishing charge of rape or sexual assault. He pointed out that injuries on the person of victim are possible on account of fall while playing with her friends. That, there was no injury to the private part and there is no finding to that extent by medical expert. On this count, he took this court through the evidence of PW5 Dr. Bangar, more particularly his cross. He pointed out that here, very injury certificate which ought to have been issued after alleged examination, is not brought on record

by prosecution and there is no explanation from the prosecution side. Mere medical papers, clinical papers and letters are placed on record and the same are relied and have been accepted by learned trial court.

8. His next submission is that in fact, though spot panchanama is shown to be drawn, nothing incriminating was seized from there. Moreover, according to him, for attracting charge of Section 452 IPC, its necessary ingredients are required to be met, however, here, prosecution evidence does not meet the said requirements.

9. He pointed out that even the Investigating Officer committed several serious lapses while conducting investigation. There is non-compliance of procedure spelt out under the POCSO Act, more particularly regarding recording statement of victim. Therefore, according to him, due to failure to follow procedure, there is possibility of victim being tutored. According to him, this aspect has not been considered by learned trial court.

10. He further submitted that another error committed by trial court is that conviction is recorded for offence of Section 376 IPC as well as Section 3 of POCSO Act, and in view of provision laid down in

Section 42 of the POCSO Act, this is not permissible. However, learned trial court recorded guilt for both the offences and as such, it is his submission that, such judgment cannot be allowed to be sustained for above reasons.

11. Lastly, he submitted that even there is no evidence for attracting charge under Section 506 of IPC as none of the prosecution witnesses has uttered of any threat given by accused and for all above reasons, it is his submission that, there is erroneous appreciation at the hands of trial court and in absence of cogent and reliable evidence, guilt having been recorded, learned counsel prays to interfere by setting aside the said judgment and by allowing the appeal.

On behalf of the respondent State :

12. In answer to above, learned APP would strongly oppose the appeal. At the outset, he pointed out that victim is merely 5 years of age. Taking advantage of her loneliness, it is submitted that, the appellant, who was a neighbour, lifted the child, took her to his house and committed grave offence of forceful sexual assault. He submitted that the girl promptly reported to the independent witness PW4 who is neighbour. She informed father of victim. Learned APP pointed out

that admittedly, though alleged occurrence is of 01.04.2017 and there is delay in reporting, it is his submission that, in cases of such nature, parents hesitate to report promptly. Moreover, here, complainant was illiterate lady. However, parents have mustered courage and they have approached police. After lodging report, investigation was carried out and victim was referred for medical examination. The doctors who examined victim as well as accused, are made to step into the witness box. Their opinion is about forceful rape. Medical papers are also placed on record and thus, according to learned APP, there being overwhelming and clinching evidence, charges are squarely proved.

13. Learned APP further pointed out that independent witnesses spotted accused carrying the victim and even victim was seen having blood stains on her person and blood was also found on the cloths of accused. There is no explanation in that regard. Therefore, there is both, independent as well as sufficient medical evidence. As regards to submission on the point of Section 42 of the POCSO Act, learned APP submitted that the Section with which present appellant is charged and held guilty, does not come under the purview of Section 42 of POCSO Act and hence, he prays that there is no merit in such submission.

14. Lastly, supporting the judgment, he pointed out that there is no merit in the appeal and he prays to dismiss the same.

On behalf of the victim :

15. Learned counsel for the respondent victim, who is appointed, also strongly opposed on the ground that victim is minor. The same is proved and not challenged or disputed. There is victim's evidence coupled with medical evidence. Heinous crime has been committed upon a child of 5 years age and therefore, on correct appreciation and trustworthy and reliable evidence, guilt has been recorded. That, there is nothing to interfere as, according to him, the judgment is well reasoned. Hence, he too prays to dismiss the appeal.

ANALYSIS

16. Though the sum and substance of the evidence of doctor and victim is reproduced above, in the considered opinion of this Court, relevant evidence as narrated by victim as well as medical expert, who examined victim, is required to be reproduced.

PW7 Victim (child witness)

17. After verifying competency of victim by putting her general questions about her name, name of school and medium of education etc., her evidence was recorded at Exhibit 31 in question-answer form, relevant portion of which is reproduced below:

“Que.5 Where you were on the day of incident?

Ans. I was at my home.

Que.6 Who were present in your house at that time?

Ans. At that time I was alone in my home.

Que.7 What had happened on that day of incident?

Ans. On the day of incident, Bhagya Baba had came at my house.

Que.8 What had happened thereafter?

Ans. Bhagyababa told me that he would give me sweets (Papdi).

Que.9 What had happened thereafter?

Ans. Bhagya Baba lifted me and took me to his house.

Que.10 What had happened thereafter?

Ans. He opened the house and he removed my clothes. He removed my knicker. Bhagyababa removed his pant.

Que.11 What had happened thereafter?

Ans. He removed by frock.

Que.12 What had happened thereafter?

Ans. Thereafter Bhagyababa slept on my person.

Que.13 What had happened thereafter?

Ans. My stomach started paining.

Que.14 What had happened thereafter?

Ans. My private part started bleeding.

Que.15 What had happened thereafter?

Ans. I started crying.

Que.16 What had happened thereafter?

Ans. Bhagya Baba wore clothes and took me to my house.

Que.17 What had happened thereafter?

Ans. I started walking towards my house at that time Shital met me. At that time I was alone.

Que.18 What had happened thereafter?

Ans. Shital asked me what had happened.

Que.19 What had happened thereafter?

Ans. I told to Shital that Bhagyababa slept on my person.

Que.20 What had happened thereafter?

Ans. Shital took me to her house.

Que.21 What had happened thereafter?

Ans. My mother and father met me after their work was over.

Que.22 What had happened thereafter?

Ans. Thereafter, my mother and father took me to hospital.

In cross, she answered that her grandmother used to remain present in house. On that day, her friends were there with her and

she had gone to play at some distance. Relevant portion of her cross in para 3 and 4 is as under:

“3. It is true to say that on the day when there was bleeding from my private part we all friend Vandana and others were playing. It is true to say that on that day we were playing in front of our house. We were playing शिवनापाणी (Shivanapani). On that day Aditya was following us. Aditya was trying to catch we friends. When Aditya was following me, I fell down. It is not true to say that as I fell down when Aditya was following me there was bleeding from my private part.....

4. There are six houses near my house. It is true to say that when my private part was bleeding, it was paining and due to pain I was crying. When it was bleeding from private part, Shital met me. She took me to her house. Shital alone was there in her house.

PW5 Dr. Bangar, Medical Officer Gynecologist

18. PW5 Dr. Bangar deposed at Exhibit 27 that on 02.04.2017 at about 05.30 a.m. when he was on duty at Civil Hospital, victim was referred to him on the history of rape. In para 2 he deposed as under:

“2. I examined the patient. On examination I found tear at lower end of vagina. The tear was large in size. Therefore, I stitched the tear on next day by giving

anesthesia to her. The patient was admitted in our hospital from 2nd of April 2017 to 8th April 2017. The patient gave history of sexual violence on 1st April 2017 at about 04.00 p.m. The said injury is possible if the patient is forcibly raped. The patient was referred to me after she was given primary treatment. There was heavy bleeding due to above said injury.”

In his cross para 3, he answered that the history of sexual violence was given by mother of patient and not by the patient. He admitted that if a 5 years old girl is subjected to sexual violence or sexual intercourse, then both labia are swollen or there may be injury to both labia and that there may or may not be swelling on the nearer part of vagina of victim of sexual intercourse. He admitted that there is no other injury in the present matter other than injury on the lower part of vagina and that there were no marks of struggle on the person of victim. He answered that injury was found on the flat part of the skin near the lower end of vagina and that there was no injury to the vagina itself.

Para 4 of his cross reads as under :

“4. It is true to say that in case of small girls of 5 years a little finger also cannot be inserted into vagina. It is true to say that a major male cannot insert his penis into

vagina of 5 years old girl due to mismatch of size of vagina and penis. It is true to say that if a major male inserts his penis into vagina of 5 years old girl then he may or may not receive injury to his glans penis. It is true to say if a girl falls on sharp object like stones then the injury of perineal tear. It is true to say that the injury on the person of patient in this matter was also looking as the injury caused due to fall on sharp object like stones. It is true to say that there is no mention of depth of injury in medical paper. It is true to say that the injury is 1 cm x 1 cm i.e. length and width respectively. It is true to say that the said injury was linear abrasion. It is not true to say that linear abrasion cannot be result of sexual assault.

On showing daily sheet dated 05.04.2017 (Exhibit 8), he admitted in para 5 of his cross that there is mention that the patient is only crying not able to tell anything mentioned by psychiatrist.

19. Oral evidence of victim, medical officer who examined victim, informant mother PW2 and neighbour PW4 is of significance and relevance. In short, case of prosecution is that, informant and her husband left house for labour work. Their minor daughter/victim was alone at home, but was playing with her friends. That day, she was picked up, lifted and taken by accused to his place and there, offence was committed.

20. Admittedly, victim was spotted by **PW4** neighbour and it is this witness PW4 who made inquiry with the victim and thereafter reported to mother. Thereafter incident in question came to light after PW4 spotted victim. On carefully analyzing evidence of PW4, it is emerging that around 5.00 p.m. that day, i.e. on 01.04.2017, while this witness was returning after answering call of nature, she claims to have seen accused carrying victim and she being dropped near her house. Witness is very categorical that she saw victim crying. She has also stated that after seeing this witness, accused took to heels. She deposed in her evidence at Exhibit 26 about noticing blood on the person of the victim and thereafter message was passed to her father.

On carefully analyzing cross faced by this witness, more particularly para 6 and 7, it is noticed that there is no challenge to the testimony of this witness. Manner of questioning and manner of suggestions itself shows that whatever she deposed has not been disputed and it is evident particularly from para 6 of her cross.

21. Another crucial witness is **PW2** mother and she, in her testimony which is discussed above, has stated that she and her husband had been for labour work. She and her husband returned and saw their daughter crying. PW4 reported them about spotting

victim crying and further reported that accused dropped her at their door and ran away. Informant mother claims that she took victim near her and noticed injury to her private part which was bleeding. Her clothes i.e. frock and undergarment worn by her were blood stained. Victim told her that “Baba has taken her into his house and he pressed her and left her on the door”. Then they took her to Rural hospital and thereafter approached police.

On visiting cross of this witness, initially para 4 and 5 are pertaining to occupation, location of the house, standard in which the victim studied, timing at which they left for work and timing at which they returned. In para 5, it is brought on record that victim was alone in the house. She also admitted that when they came at around 5.30 p.m., she washed victim. Again in para 6, it is brought that clothes of victim were blood stained and that accused was apprehended by crowd and given thrashing. Similarly, in cross para 7 and 8, occurrence is brought on record and is thus not at all challenged. Mother has flatly denied about any previous quarrel with accused.

22. Now, let us see whether there is corroboration by way of medical evidence, as is claimed by prosecution. **PW5** Dr. Bangar, in his above discussed testimony, has categorically stated about

examining the victim, noticing tear to the lower end of private part and giving sutures and about victim to be admitted from 2nd April 2017 to 8th April 2017. He has also opined that such injury is possible due to forceful rape.

In cross, it is brought that history was given by mother and not by patient. Hypothetical question is posed that if a 5 years old girl is subjected to sexual violence or sexual intercourse, then both labia are likely to be swollen and injury is possible to labia. This medical expert has admitted that except injury to the vagina, there was no other injury and that there were no marks of violence on the person of victim. Doctor has also admitted that major male organ cannot be inserted in vagina of a 5 years old girl due to mismatch of size, and that there is possibility of perineal tear if the girl falls on sharp object like stone.

23. Learned counsel for the appellant has raised a point that, here, there is no convincing evidence and secondly, FIR is at the instance of mother to whom subsequently information is allegedly passed. Here, it is to be noted that informant was out for earning bread i.e. by doing labour work. She has categorically stated, and is also brought in cross that, victim was alone. Here, evidence of PW4 neighbour is very

crucial and she is star witness. This witness has stated that she has spotted accused carrying the girl and dropping her at her doors and thereafter, finding the victim crying, she had sent message to her father. In the considered opinion of this Court, PW4 was present when victim told her mother about the ordeal faced by her. Therefore, such witness is a *res gestae* evidence. Medical evidence discussed above confirms tear to private part of the minor victim.

24. Pointing to the cross, it is tried to be submitted that medical expert has not noticed any violence marks or any injury due to forceful rape. Such submissions deserve to be discarded outright as, in view of the settled law, absence of injuries of resistance or violence in case of such nature is of no significance, more particularly in the light of tender age of the child. Independent witness PW4 and mother PW2 had noticed blood on the private part as well as garments of victim. Testimony of PW4 and informant mother to such extent has not been disturbed. Therefore, in the considered opinion of this Court, there is convincing and overwhelming evidence regarding occurrence and offence.

25. Learned counsel also objected to the conviction rendered by trial court for offence under Sections 376(2)(i) and 376(2)(m) of IPC

as well as under Section 3 of POCSO Act and according to him, there is error committed by trial court as, in view of Section 42 of the POCSO Act, there cannot be conviction both, for IPC as well as POCSO Act.

After going through the said provision and on going through the operative part, it does seem that learned trial court has convicted appellant both, under Section 376(2)(i) and 376(2)(m) as well as under Section 3 of the POCSO Act. Section 42 of the POCSO Act, which is taken recourse to, provides for alternative punishment. However, in the said provision, along with other Sections, Section 376, which is main and substantive offence, is also reflected and it is further provided that, *“notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree”*. Section 42-A of the POCSO Act, also provided that, *“the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency”*. However, in the instant case, sentence awarded

under such IPC Sections as well as under the POCSO Act Section 3 is the same i.e. rigorous imprisonment for ten years. Thus, for above reasons, no case is made out on merit to interfere. Hence, I proceed to pass the following order :

ORDER

- I. The appeal is dismissed.
- II. Fees of the learned appointed counsel to be paid through the High Court Legal Services Sub Committee, Aurangabad as per Rules.

[ABHAY S. WAGHWASE, J.]

vre